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No. 98-199

In The

Supreme Court of the United States

October Term, 1997

ACCESS TELECOMMUNICATIONS, L.L.C., formerly known as UNIFIED TELECOMMUNICATIONS, L.L.C., on behalf of itself and all others similarly situated,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1998

QUESTION PRESENTED

Petitioner wholly mischaracterizes the issue before this Court. Petitioner frames the issue as whether the doctrine of primary jurisdiction should be applied ". . . so as to eviscerate the filed rate doctrine. . . ." Petitioner states that the issue at stake is the "continuing vitality of the filed rate doctrine." The filed rates doctrine has absolutely nothing to do with this case. The District Court below dismissed Petitioner's case based upon the *primary jurisdiction doctrine*, not the *filed rates doctrine*. The "filed rates" doctrine stands for the proposition that both the carrier and the customer are bound by the terms of legally filed tariffs. Respondent SWBT concedes that SWBT is obligated to follow the terms of its own filed tariffs. There is no question about that. The issue below was not whether SWBT was bound to follow its own tariffs, but rather which entity — the District Court or the FCC (the federal agency charged with interpreting SWBT's tariffs) —was entitled to make the primary determination. In other words, the issue was not whether the pitch was a ball or a strike, but rather which umpire was entitled to make the call. Petitioner purposely obfuscates the issue before the Court in a vain attempt to create some type of conflict between the case at bar and this Court's recent filed rates doctrine case, *American Tel. And Tel. Co. v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998). No such conflict exists. The appropriate statement of the issue before the Court is the following:

Did the District Court err in applying the doctrine of primary jurisdiction to Plaintiff's claim for a refund of the difference between two tariffed rates for a particular telecommunications service, where resolution of the claim will necessarily require an interpretation of complex and technical tariff specifications which are part of a comprehensive regulatory scheme and which have been placed within the special competence of the Federal Communications Commission?

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Access Telecommunications, L.L.C., formerly known as Unified Telecommunications, L.L.C., on behalf of itself and all others similarly situated, Petitioner, and Southwestern Bell Telephone Company, Respondent. The parent company for Respondent is SBC Communications Inc. and Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. The Technical Specifications of the Tariff

Petitioner Access glosses over some of the important facts which were critical to the decision of the United States Court of Appeals for the Eighth Circuit.[1] Specifically, Petitioner Access fails to point out to the Court the highly technical nature of the inquiry which will be necessitated by its lawsuit, an inquiry best resolved by the FCC, which can apply its technical expertise and ensure uniformity of the regulatory scheme.

Petitioner Access is a re-seller of long distance service. App. 2a. Access is able to offer this service by connecting customers to various long distance providers using SWBT's local lines. App. 2a. SWBT is required to offer inter-connection customers various voice grades, ranging from 1 to 12, which determine the quality of service on the circuit. App. 3a. The customer can decide which grade of service is best for him/her. VG 1 is the lowest grade service; VG 12 is the highest. App. 3a. Petitioner sought to purchase VG 7 circuits from SWBT. App. 3a.

As required by federal law, common carriers like SWBT must file with the FCC tariffs setting forth a schedule of charges for the

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1. It should also be noted that Petitioner completely misrepresents the Eighth Circuit's decision below. Petitioner states that the Eighth Circuit held that " . . . before Access could sue, the FCC should determine whether *Southwestern Bell's violation of its tariff was nevertheless reasonable*." This statement suggests that the Eighth Circuit held that SWBT violated the terms of its own tariff, but that this would be permissible as long as the violation was deemed "reasonable." That is simply a fabrication from whole cloth. To the contrary, the Eighth Circuit made no determination whatsoever as to whether the tariff was violated. In fact, this very issue was deferred to the FCC. Petitioner's misrepresentations of fact and law to this Court should be considered in determining whether to grant certiorari.

various services they provide. *See* 47 U.S.C. § 203. Accordingly, SWBT filed FCC Tariff No. 73 which established charges for each VG level. App. 3a. The FCC approved the Tariff, and SWBT agrees with Petitioner that SWBT must provide access services pursuant to the terms of the Tariff. App. 3a.

The Tariff provides that SWBT must provide VG7 service in conformance with specific technical transmission standards. The Tariff incorporates a Technical Specifications Package ("TSP") into the Tariff. App. 3a. The TSP sets forth the exact technical parameters which must be met in order to provide VG7 service. As one example, there is a specific technical parameter for "echo control", App. 3a, which relates to the amount of echo heard over the line. If SWBT provides service with too much echo such that it does not meet the minimum parameters for echo control in the TSP, then SWBT violates the Tariff. Thus, at all times, SWBT must make sure that it can *consistently* meet these technical service requirements for the customer. The TSP has seventeen subsections relating to specific technical parameters, which include the following:

- Available Signaling
- Available Options
- Loss Deviation
- Three-Tone Slope
- Attenuation Distortion
- Envelope Delay Distortion
- C-Message Noise
- C-Notched Noise
- Impulse Noise
- Signal to Intermodulation Distortion Ratio
- Phase Jitter
- Frequency Shift
- Phase Hit, Gain Hit, and Dropout Performance
- Echo Control

- VG 7-Compatible EU-NI, IC-POT, and CO-NCI Code Combinations
- VG 7- Compatible TLP Ranges at the EU-NI
- VG 7-Compatible Ranges at the IC-POT

Supplemental Appendix filed with the United States Court of Appeals for the Eighth Circuit ("SA"), p. 102. Each of these subsections, in turn, contains a complex listing of acceptable engineering levels within each category to ensure the type of quality of signal requested by the customer. For example, under the heading "Echo Control," the TSP provides as follows:

5.9.14 Echo Control

Transmission and Test Configuration		Type of Measurement	AL (dB)		IAL (dB)	
Measure @	Terminate @		ERL	SRL	ERL	SRL
Effective 2-Wire Transmission						
EU-NI (2W) or CO (2W)‡	IC-POT (4W)	STD-RL	5.5	3	5	2.5
		IMP-RL *	15	9	13	8
IC-POT (4W)	EU-NI (2W) or CO (2W)‡	ELEPL-1	7.0	4.5	5.5	2.5
		ELEPL-2 *	18	12	16	11
4-Wire Transmission with 2-Wire Interface						
EU-NI (2W) or CO (2W)‡	IC-POT (4W)	RL	26	20	24	18
IC-POT (4W)	EU-NI (2W) or CO (2W)‡	ELEPL	23	16	20	14

SA 117. There are similar tables of specifications for the other parameters as well. SA 113-122. Needless to say, these specifications are highly complex and technical in nature.

Petitioner Access argues that in January 1991, SWBT forced it to purchase VG 7 service on a "four-wire circuit" instead of the less-expensive "two-wire circuit" for all circuits where the distance from the central office to the connection was over 6,000 feet in length. App. 4a. SWBT required this charge because Bellcore — the same group which developed the technical specifications listed above — determined through scientific testing that when the circuit length gets over 6,000 feet, it becomes difficult if not impossible to consistently maintain the quality parameters for VG 7 service found in the tariff. App. 4a. When the distance gets beyond 6,000 feet, "attenuation distortion" and "echo return loss" increase to unacceptable levels — levels which do not comply with the TSP. App. 4a.

Petitioner Access argues that the 6,000-foot classification was an "off-Tariff pricing criteria." Not so. It is true that the words "6,000 feet" appear nowhere in the Tariff. However, SWBT maintains that a 6,000-foot requirement is the exact same thing as compliance with the TSP's attenuation distortion and echo loss parameters. An analogy makes this point clear. If a tariff provided that SWBT must consistently ensure that a customer's pot of water was boiling, SWBT could require the customer to make sure his stove could heat up to a minimum of 212 degrees Fahrenheit, because, as a matter of science, the boiling point of water is 212 degrees. This is so even if the words "212 degrees Fahrenheit" are nowhere listed in the tariff. The 6,000-foot requirement is not an arbitrary off-Tariff pricing criteria. It is a classification based upon science, a classification imposed in order to ensure that the very terms of the Tariff are followed.

B. Course of Proceedings and Disposition Below

Access brought suit under the Communications Act of 1934 on behalf of itself and other SWBT customers receiving VG7 service on the more expensive 4-wire circuit since January 1991. SWBT moved to dismiss the case without prejudice under the doctrine of primary jurisdiction, arguing that the FCC was better-equipped to handle the question of the reasonableness of SWBT's tariff classification. The United States District Court for the Eastern District of Missouri dismissed the case without prejudice, finding that the FCC had primary jurisdiction of the dispute. The Eighth Circuit affirmed the dismissal.

Petitioner notes in its Petition for Writ that the Eighth Circuit rendered its decision "without consideration of the filed rate doctrine." App. 4. There is a very good reason why the Eighth Circuit did not rule on the filed rates doctrine — the doctrine is irrelevant at this stage of the proceedings. The first issue before the District Court and the Eighth Circuit was not whether SWBT's application of its tariff was proper or reasonable, but rather which entity — the District Court or the FCC — should make the primary determination. If Petitioner wishes to argue that under the filed rates doctrine, SWBT was obligated to abide by its own tariff, it can make that argument to the FCC when it files its complaint with the FCC.

REASONS FOR DENYING THE WRIT

I.

THE APPLICATION OF THE PRIMARY JURISDICTION DOCTRINE DOES NOT "EVISCERATE" THE FILED RATES DOCTRINE.

Petitioner Access erroneously states that the application of the primary jurisdiction doctrine here will spell the "demise of the

filed rates doctrine." App. 5. The primary jurisdiction doctrine only relates to the issue of who will decide the case —the District Court or the FCC. It does not in any way, shape or form prevent Petitioner from arguing the application of the filed rates doctrine. The filed rates doctrine merely provides that the carrier and customer are both bound by the terms of the Tariff. There is no dispute about that. SWBT agrees that it has to provide VG7 service by the terms of the Tariff. SWBT contends that it is doing just that — by using scientific principles, SWBT is ensuring that all the parameters of the Tariff are met. It is Petitioner Access who seeks to stray from the Tariff. If Access were allowed to use a two-wire circuit for its business locations which are greater than 6,000 feet from SWBT's central office, SWBT would be unable, as a matter of simple science, to comply with the terms of the Tariff.

Petitioner Access apparently disputes this scientific conclusion, and contends that there are some 2-wire circuits over 6,000 feet in length which can still satisfy the TSP's requirements for attenuation distortion and echo control. Therefore, the resolution of this controversy will necessarily boil down to a battle over science — over such matters as attenuation, echo return loss, C-message noise, envelope delay distortion, frequency shifts, impulse noise, intermodulation distortion, gain hits, phase jitter, wire gauge, signal-to-C message noise, signal-to-notch noise, and so on. This is obviously not an area with which Courts have developed special technical expertise.

The FCC, however, does possess such expertise. The FCC is specifically charged with the responsibility of determining whether "all charges, practices, classifications and regulations" involving tariffed telecommunications services are reasonable. 47 U.S.C. § 201(b). The FCC has far more expertise than courts in determining circuit designs, signal transmissions, noise attenuation, echo loss, and so on. App. 6a-7a. It is for this reason that the United States Court of Appeals for the Eighth Circuit affirmed the District

Court's decision to dismiss without prejudice Petitioner's Complaint in federal court, in order to allow the Petitioner to first proceed to a resolution of these issues before the FCC. After the FCC makes its determination on the technical issues under the Tariff, if Access prevails, then this case can return to federal court for any necessary trial on damages.

II.

THIS CASE DOES NOT CONFLICT WITH *CENTRAL OFFICE TELEPHONE* OR *MAISLIN.*

Petitioner Access contends that the Eighth Circuit's decision conflicts with this Court's decision in *American Tel. & Tel. Co. v. Central Office Telephone, Inc.*, 524 U.S. __, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) and *Maislin Industries, United States v. Primary Steel, Inc.*, 497 U.S. 116 (1990). To the contrary, there is no conflict whatsoever. In *Central Office Telephone*, a re-seller experienced problems with the Software Defined Network ("SDN") service provided by AT&T. SDN is a service in which employees in different locations are allowed to communicate easily. For example, an employee in Washington can call a co-worker in Denver simply by pressing a four-digit extension. The re-seller filed suit in federal court against AT&T, alleging that: (1) the re-seller's contracts with AT&T were not limited by the terms of the FCC tariff filed by AT&T, but also included representations made by AT&T's employees and sales literature; and (2) AT&T had promised the re-seller certain service, provisioning, and billing options in addition to those set forth in the tariff. AT&T argued that the re-seller's state law contract and tort claims were preempted by the filed tariff doctrine, since AT&T was only required to provide the service delineated in the tariff, and no more. The District Court disagreed and allowed the jury to consider matters outside the tariff. The jury found for the re-seller, and the Ninth Circuit affirmed.

This Court granted certiorari and reversed. The Court held that the filed rates doctrine applies not only to the Interstate Commerce Act (the statute which was relevant in the *Maislin* decision), but also to the Federal Communications Act. *Id* at 233. The Court held that the carrier is only required to provide the services listed in the tariff at the rates listed in the tariff and no more. This minimal obligation applies even where the carrier intentionally misrepresents its rate and a customer relies on it. *Id*. If the quoted rate is different from the tariffed rate, the tariffed rate applies. While this result may seem harsh in some circumstances, the Court held, the strict application was necessary to prevent discrimination in rates. *Id* at 233. The Court also rejected the re-seller's argument that the doctrine should only apply to disputes over "rates," not "services," holding that any claim for rates could be couched in terms of services.

This case, of course, does not even mention the words "primary jurisdiction doctrine." The issue was never raised. Accordingly, it is difficult to understand how Petitioner can contend that there is a conflict between the two cases. The two cases simply address wholly different subjects. *Central Office Telephone* concerned the application of the strict terms of the tariff in the face of alleged misrepresentations or promises outside the terms of the tariff. The case at bar, in contrast, merely concerns which adjudicator will make the decision — the District Court or the FCC.

III.

PETITIONER'S ARGUMENT REGARDING IMPROPER EXPANSION OF THE PRIMARY JURISDICTION DOCTRINE MUST FAIL.

Petitioner next contends that the Eighth Circuit improperly expanded the primary jurisdiction doctrine. This argument also

fails. The decision of the Eighth Circuit was directly in line with this Court's decision in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956). In *Western Pacific*, the United States Government paid railroad companies to ship certain merchandise. The rates which the Government was required to pay for the carriage were set forth in published tariffs. There were several tariffs relating to the shipment of dangerous and explosive merchandise. The tariffs specifically provided for one rate for "incendiary bombs" and one rate for "gasoline in steel drums." The tariffed rate for "incendiary bombs" was higher, presumably because it took greater care and cost to handle bombs versus gasoline. The Army sought to ship by rail 211 containers of steel aerial bomb cases filled with napalm gel. Napalm gel is gasoline which has been thickened by the addition of aluminum soap powder. The mixture is flammable but not self-igniting. In a completed incendiary bomb, the napalm gel is ignited by white phosphorous contained in a burster charge, which in turn is fired by a fuse. The Government argued that they were not required to pay the "incendiary bomb" tariffed charge because the burster and fuse were not contained in the shipments. The railroad carriers disagreed and sued to obtain the difference between the "gasoline in steel drums" tariffed rate and the "incendiary bombs" tariffed rate. The Government argued that the issue should be resolved by the Interstate Commerce Commission first under the doctrine of primary jurisdiction. The United States Court of Claims disagreed, and entered summary judgment for the railroad, holding that the shipments were "incendiary bombs."

On certiorari, the Supreme Court of the United States reversed and remanded, holding that the case should have been referred to the ICC under the doctrine of primary jurisdiction. Interestingly, the Court rejected the railroad's argument that primary jurisdiction was inappropriate *where the only question was the construction of a tariff, as opposed to a challenge to the reasonableness of the tariff*:

> We have concluded that in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the [ICC].
>
> * * *
>
> . . . courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well. **[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that "the inquiry is essentially one of fact and of discretion in technical matters," then the issue of tariff-application must first go to the Commission**. The reason is plainly set forth: such a "determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." [citations omitted]. (emphasis added)

Id. at 63, 66. The Supreme Court concluded that complex and technical cost-allocation and accounting principles were initially used to set the railroad's tariffs. The Court held that in order to determine if napalm gel should be construed as falling under the incendiary bomb tariff, the decision maker would necessarily be required to have a working knowledge of these technical matters. *Id.* at 66-67. The Court held that resolving the question would involve ". . . more than simply a question of reading the tariff language or applying abstract 'rules' of construction." To decide the issue without a familiarity with these technical issues would,

in the Supreme Court's view, ". . . make the process of adjudication little more than an exercise in semantics." *Id.* at 67.

This case is directly applicable to the case at bar. Petitioner Access is claiming that SWBT should have charged it the two-wire tariffed rate instead of the four-wire tariffed rate. Access claims that this is a matter of simple tariff construction and enforcement. But, as in *Western Pacific*, this case involves more than simply reading the tariff language and applying abstract rules of construction. In order to determine why SWBT established a 6,000 foot cut-off, and why it was necessary to charge a four-wire rate, it will be necessary for the Court to become embroiled in the technical aspects of circuit design and signal transmission. The Court will necessarily have to have a working knowledge of concepts such as noise attenuation, echo return loss, C-message noise, envelope delay distortion, loss deviation, phase hits, phase jitter, signal-to-C message noise, signal-to-C notch noise, impulse noise and intermodulation distortion. The Court will necessarily have to wade through the thicket of the Technical Specifications Package. The Court will have to become intimately familiar with the field and simulation testing of Bellcore, Inc. As in *Western Pacific*, this will require voluminous extrinsic evidence just to explain what the tariff means. This is obviously not an appropriate matter for district courts to determine in the first instance. This is a perfect case for application of the primary jurisdiction doctrine. The district court was correct in dismissing the case without prejudice to allow the Petitioner to pursue the technical aspects of its claim with the FCC, the agency charged with understanding and administering these technical tariffs. To do otherwise would make the district court's adjudication "little more than an exercise in semantics."

IV.

PETITIONER'S REQUEST FOR A WRIT DOES NOT MEET THE STANDARDS OF RULE 10.

Supreme Court Rule 10 specifically provides that review on certiorari "is not a matter of right, but of judicial discretion," and is only granted for "compelling reasons." The Court's suggested list of compelling reasons includes:

> (a) (1) a United States Court of Appeals decision in conflict with another U.S. Court of Appeals decision on the same important matter;
>
> (2) a United States Court of Appeals decision on an important federal question which conflicts with a decision by a state court of last resort;
>
> (3) a United States Court of Appeals decision which has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or
>
> (c) (1) a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court;

> (2) a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court;
>
> (3) a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court; or
>
> ***(4) a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.***

See S. Ct. Rule 10(a)-(c).

It is clear that none of the scenarios in subsections (a) through (c)(3) are applicable here. The only argument made by Petitioner in this case is subsection (c)(4) — namely, that the Eighth Circuit's decision conflicts with this Court's decisions in *Central Office Telephone* and *Maislin*. Since those cases involved the filed rates doctrine, and not the primary jurisdiction doctrine, it is difficult to see how that provision is applicable. Therefore, there simply is no basis under Rule 10 for the grant of certiorari.[2]

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2. In addition, Rule 10 states that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or *the misapplication of a properly stated rule of law*. Petitioner here is alleging a "misapplication of a properly stated rule of law."

CONCLUSION

Because Petitioner has failed to satisfy the threshold requirements of S. Ct. Rule 10, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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